No. 14,965

United States Court of Appeals
For the Ninth Circuit

WARREN C. GRAHAM and AGNES B. GRAHAM, His Wife, and CATHERINE YOUNG COBB, *Appellants,* vs. UNITED STATES OF AMERICA, STATE OF CALIFORNIA, CITY OF OAKLAND and COUNTY OF ALAMEDA, *Appellees.*	

BRIEF FOR APPELLANTS.

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WARREN C. GRAHAM and AGNES B. GRAHAM, His Wife, and CATHERINE YOUNG COBB,
Appellants,

vs.

UNITED STATES OF AMERICA, STATE OF CALIFORNIA, CITY OF OAKLAND and COUNTY OF ALAMEDA,
Appellees.

BRIEF FOR APPELLANTS.

JURISDICTIONAL STATEMENT.

On August 17, 1951, appellees commenced this action in the United States District Court for the Northern District of California Southern Division to enforce alleged Federal tax liens.

Jurisdiction of the said District Court for the enforcement of tax liens is vested by the provisions of Section 3678, I.R.C. 1939, 26 U.S.C.

The cause was tried before the Honorable O. D. Hamlin, judge of the District Court. Judgment for appellees establishing liens and decree of foreclosure

and order of sale were entered on September 14, 1955. On October 14, 1955, appellants filed a notice of appeal.

The jurisdiction of this Court is invoked by and under the provisions of Section 1291, 26 U.S.C. and Section 1294, 26 U.S.C.

STATEMENT OF CASE.

The Collector of Internal Revenue sought to enforce tax liens against appellant for the year 1942 as a transferee of the Kincaid Company; to set aside a conveyance of property as a sham and fraud; and to have said lands sold and the proceeds applied to liens in the priorities as determined.

Appellant attempted to introduce evidence showing the invalidity of the transferee assessment and failure of the Collector of Internal Revenue to give notice and demand. The District Court excluded such evidence and found for the appellees.

ISSUES.

1. Is it error to exclude evidence which challenges the validity of the Government lien sought to be foreclosed and the assessment upon which it is based?

2. Did the District Court err in failing to find the waivers were signed under duress?

3. Did the District Court err in finding that the transfer of the land to Catherine Young Cobb was fraudulent?

STATEMENT OF FACTS.

Warren C. Graham and Agnes B. Graham were engaged in defense business during World War II, primarily manufacturing smoke screens and flame throwers for the Government. Their business enjoyed the expansion usual to wartime activities and the subsequent overexpansion and attendant tax difficulties which were familiar pattern in such industries. In 1945 the appellants Graham were residents of Oakland, California, and engaged in business there. Appellant Warren C. Graham purchased a home for his wife Agnes B. Graham, which she did not like and, appellants testified, it was subsequently given as a gift to Mr. Graham's daughter, Catherine Young Cobb.

The Commissioner of Internal Revenue purportedly assessed Federal income and excess profit taxes for the year 1942 in excess of $16,000.00 each against appellants Graham as transferees of the Kincaid Company in the Second District of New York. That assessment was subsequently transferred to the Collector of Internal Revenue, San Francisco. This action was eventually brought to enforce such assessments together with others and an order and judgment entered that all property belonging to the Grahams and the home belonging to Catherine Young Cobb be sold and the proceeds applied to satisfaction of tax

liens. The lower Court held that the transfer of property to Catherine Cobb was either (a) fradulent transfer to avoid tax liens, or (b) no more than a gift. In the Court below, the appellants denied that they were transferees of the Kincaid Company, denied liability for the transferee tax, and sought to introduce evidence challenging the validity of the assessment upon which the liens were based (transcript, pages 95, 96, 116).

The appellants further offered to prove that they had received no notice of the 1942 assessment and that no 90 day letter, as required by Section 272(a), I.R.C. 1939, 26 U.S.C. 81, had been sent to them. Although the Government introduced no evidence to the effect that such letter had been mailed, as required, the Court ruled that evidence of appellants on this subject was inadmissible (transcript, pages 188, 189.)

Prior to the filing of the suit appellant Warren C. Graham had been sentenced and served a period of time in the Federal Penitentiary at McNeil Island, Washington. During this time and while he was a prisoner, he and his wife were approached by members of the Internal Revenue Department with tax waivers, which would have the effect of prolonging the statute of limitations for filing of actions against the Grahams. It was the appellant's position that as a prisoner he was subjected to undue duress, as was his wife, by the understanding that his parole would be facilitated by signing of these documents. No finding of fact or law was made concerning the validity of said waivers on the grounds of duress, although

this was an extremely important issue to the appellants (transcript, pages 114, 151, 194, 226).

ARGUMENT.

I. THE COURT ERRED IN REFUSING TO ADMIT TESTIMONY TENDING TO SHOW THAT THE PURPORTED KINCAID COMPANY TRANSFEREE TAX ASSESSMENT WAS NEITHER VALID NOR PROPER.

A. The Federal Tax Lien Is Based Upon a Proper Assessment and the Failure of the Commissioner to Proceed in the Matter Prescribed by the Internal Revenue Code Defeats the Validity of the Lien.

In the proceeding below appellee sought to assert and enforce a tax lien provided for by Sections 3670, 3671, I.R.C. 1939, Title 26, U.S.C. The sections provide:

> "Section 3670. Property Subject to Lien. If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person."

> "Section 3671. Period of Lien. Unless another date is specifically set by law, the lien shall arise at the time the assessment list was received by the Collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time."

By reading these two statutes in conjunction it is clear that there are three conditions precedent to the existence of any lien asserted under these provisions:

(a) Liability of the taxpayer;

(b) Receipt of the assessment list by Collector;

(c) Demand for the payment of the tax.

In Re Holdsworth, 113 F. Supp. 878.

The condition precedent to the existence of a tax lien that the assessment list be received by the Collector of Internal Revenue before a lien is created impliedly supposes and demands that such assessment be properly made. The failure of the Commissioner to comply with the requirements, and limitations of Section 272, I.R.C. 1939, 26 U.S.C., prevents the lien from arising. Assessment of income tax by the assessor in the mode prescribed by law is essential to the creation of such lien.

U. S. v. Pacific Railroad (1880), 1 Fed. 97, 1 McCrary 1.

Section 272, I.R.C. 1939, 26 U.S.C., provides:

"Section 272. Procedure in General. (a) (1) Petition of the Tax Court of the United States. If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect to the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed, the taxpayer may file a petition with the Tax Court of the United States for redetermination of this deficiency. *No assessment of* a deficiency in respect of the tax imposed by this chapter . . . *shall be made* . . . until such notice has been mailed to the taxpayer . . ." (Emphasis added).

As Chief Judge Denman has held, the absence of the proper deficiency letter as prescribed by law defeats the validity of the assessment.

> *Ventura Consolidated Oil Fields v. Rogan* (C.C.A. Cal. 1936) 86 Fed. 2d 149 Cert. den. 57 Sup. Ct. 610.

As the very existence of the lien depends upon the existence of a proper assessment, the propriety of the lien in the assessment may be challenged by the person against whom the lien is sought and the matter determined in full by the District Court.

B. The Failure of the Commissioner to Comply With the Statutory Directive by Congress Deprives the Commissioner or Any Other Officer of the Internal Revenue Service Authority to Maintain This Action and Failure of the District Court to Allow Evidence to Prove Failure of Compliance Is Error.

As noted subsequently, when the Commissioner chooses to proceed against a transferee under the provisions of Section 311, I.R.C. 1939, 26 U.S.C., his action is subject to the same provisions and limitations as in the case of deficiency proceeding against the "original" taxpayer.

There is no question but what the provisions of Section 272(a) I.R.C. 1939, 26 U.S.C., apply and that the Commissioner is bound to comply with this section.

Section 272(a) I.R.C. 1939, 26 U.S.C., provides:

> "Section 272. Procedure in General. (a) (1) Petition of the Tax Court of the United States. If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect to

> the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to a taxpayer by registered mail. Within ninety days after such notice is mailed, (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day) the taxpayer may file a petition with the Tax Court of the United States for redetermination of this deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and *no distraint or proceeding in Court* for its collection *shall be made,* begun, or prosecuted until such notice has been mailed to the taxpayer . . ." (Emphasis added).
>
> "Notwithstanding the provisions of Section 3653(a) the making of such assessment of a beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court."

The purpose of this provision is to provide a method for review of tax *liability* before assessment and compulsory collection and to safeguard against erroneous action by the Commissioner and to suspend his authority to proceed with collection until the person sought to be subjected to payment has been notified and given an opportunity to petition the Tax Court for review.

Maxwell v. Campbell (C.C.A. 5, 1953) 205 F.2d 461;

Ventura Consolidated Oil Fields v. Rogan (supra);

U. S. v. Continental National Bank & Trust Co. (Ill. 1939) 59 Sup. Ct. 308, 305 U.S. 398, 83 L. Ed. 249.

It has also been held that the directives to the Commissioner in this section are mandatory.

Heinemann Chemical Co. v. Heiner (C.C.A. Pa. 1937) 92 Fed.2d 344;

Smith v. Gowan-Stobos Estate (1942) 41 N.E. 2d 630, 112 Ind. App. 11.

Congress has in certain instances given taxpayers a right to prohibit collection of taxes by injunction. That exception (I.R.C. 3653(a)) does not however apply to transferees of the type with which we are here concerned who are governed by the provisions of I.R.C. 3653(b). In any event, the Congress did not intend in any way to limit the rights of transferees and appellants contend that the District Court should have taken evidence to prove the Commissioner's failure to comply with Section 272(a), with consequent dismissal of this action.

U. S. v. Merrill, D.C. Calif. 1952, 107 Fed. 2d 836.

But what was the position of the appellees in the Court below? Mr. Watson, attorney for the Government, started the action by stating (transcript, page 97):

> If your Honor please it is long past the time that you can contest these taxes . . . they can't be questioned by anybody now.

The Government over the strenuous objections of the defendants sought and obtained admission of a purported summary of taxpayers accounts (transcript, pages 95, 96). This document (plaintiffs' exhibit No.

5) was later used by the Government in an attempt to substantiate their assumed following of the requirements of the Internal Revenue Code for assessment purposes. As shown, however (transcript, page 122), there was no such 90 day deficiency letter:

> Mr. Wagner. Can you show me, counsel, where it says here a letter, a 90 day letter was sent and what date it was sent?
>
> Mr. Watson. I can't show you there. I am wrong on that. This doesn't show it, either.
>
> The Court. Well, where is it shown, counsel?
>
> Mr. Watson. Your Honor, it isn't shown.

Again, (transcript, page 188) the attorney for the Government made the statement that there was a presumption that a 90 day letter had been forwarded, although there was no evidence to that effect. The appellants made an offer of proof to show that such was not the case. This was denied by the Court, purportedly, on the authority of *Commercial Credit v. Schwartz,* 126 F. Supp. 728, dealing with I.R.C. 3679. A careful reading of that case, however, and a search of the background of transferee tax cases, must lead to the conclusion that appellants, similar to all other transferees, have a basic right to contest the validity of the assessment and that the Courts have never denied such right. This becomes apparent when the history of transferee tax liability is considered.

Prior to 1926, the liability of a transferee of the assets of a taxpayer could be determined and enforced only by foreclosing or pursuing a remedy now known as the "trust fund" doctrine.

In essence, this was a procedure by the Collector analogous to a creditor's bill in equity wherein the Government sought to establish that the distribution of the taxpayer's assets were under such inequitable conditions that the Court should impose a trust upon the assets received by the transferee and order the assets sold for the benefit of the Government. It was necessary to show that the transferee had received the assets, that they were obtained for little or no consideration and that the transfer rendered the transferor insolvent.

U. S. v. Kane, 113 Fed. Supp. 304.

In these "trust fund" proceedings the burden of proof is on the United States to prove the liability of the transferee. However, the purported transferees were allowed to question the existence of their liability.

U. S. v. Lamb, 26 Fed. 2d 830;
U. S. v. Barber, 24 Fed. Supp. 229.

In 1926, Congress enacted Section 311, I.R.C. 1939, 26 U.S.C., which, in effect, allowed the Commissioner to proceed against recipients of a taxpayer's assets in the same manner as if the recipient was the original taxpayer.

Section 311 provides:

"Section 311. Transferred Assets.

a. Method of Collection. The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of defi-

ciency in a tax imposed by this chapter (including the provisions in case of delinquency and payment after notice and demand, of the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds):

(1) Transferees. The liability, at law and equity, of a transferee of property of a taxpayer, in respect to the tax (including interest, additional amounts, and additions to the tax provided by law) imposed upon a taxpayer by this chapter."

The wording of this statute makes it evident that the intent of the Congress was to impose a procedure and remedies previously available against original taxpayers to transferees; in a sense, to treat them as original taxpayers.

Tooley v. C.I.R., 121 Fed. 2d 350.

It is to be noted that the limitations of the section providing for assessment were also to apply. This new procedure was held not to be exclusive and the Commissioner could still, if he so chose, proceed against a transferee under the "trust fund" doctrine.

U. S. v. Fisher, 57 F. Supp. 410.

However, if the Commissioner of Internal Revenue elects to proceed under the authority of Section 311, he is bound to comply with the requirements and limitations imposed by Section 272, I.R.C. 1939, 26 U.S.C. The lien provided for by Section 3670 would now also be applicable to transferees under Section 311.

The question presented on this appeal is whether a transferee may challenge the existence of liability of the transferee in an action to foreclose the lien asserted against him. In any action brought to recover taxes due to taxpayer, the taxpayer should have the right to contest tax liability in order to determine if there is a deficiency. 9 *Merten's Law of Federal Income Taxation* 163.

Appellants contend that the liability of a transferee may be contested in an action to foreclose a lien, especially where the transferee had no opportunity afforded him to contest a deficiency allegedly assessed by the Commissioner of Internal Revenue. A transferee cannot be rendered liable without a showing that in law and equity he is bound to pay the taxpayer's obligation.

> *Shelton v. Gill* (C.C.A. N.C., 1953) 202 Fed. 2d 503.

Appellant directs the attention of the Court to 3 *U. S. Code Congressional and Administrative News* 4579, 5260, 5344 (1954). The statute involved is Section 3678, I.R.C. 1939, 26 U.S.C., which gives the District Court jurisdiction to hear and adjudicate *all* matters involved therein and finally determine the merits of all liens upon the property in question. The statute provides:

> "Section 3678. Civil Action to Enforce Lien on Property (a) Filing. In any case where there has been a refusal or neglect to pay any tax and it has become necessary to seize and sell property and rights to property, whether real or personal,

to satisfy the same, whether distraint proceedings have been commenced or not, the Attorney General at the request of the Commissioner may direct a civil action to be filed, in a District Court of the United States, to enforce a lien of the United States for tax upon any property and rights to property, whether real or personal, or to subject any such property and rights to property owned by the delinquent, or in which he has any right, title, or interest, to the payment of such tax.

(c) Adjudication and Decree. The said Court shall, at the term next after the parties have been duly notified of the proceedings, unless otherwise ordered by the Court, proceed to adjudicate all matters involved therein and finally determine the merits of all claims to and liens upon property and rights to property in question, and, in all cases where a claim or interest of the United States is established, may decree a sale of such property and rights to property, by the proper officer of the Court, and a distribution of the proceeds of such sale according to the findings of the Court in respect to the interests of the parties and of the United States."

A major factor in determining whether or not the taxpayer may challenge the essential existence of the lien in foreclosure proceedings under this statute can be found by reference to the House and Senate Committee Reports prepared to accompany HR8300, "A Bill to Revise the Internal Revenue Laws of the United States". As reported in 3 *U. S. Code Congressional and Administrative News* (1954):

> House Committee Report at page 4579:
> "Section 7403. Action to Enforce Lien or to Subject Property to Payments of Tax.
> This section contains no material change from existing law, except for the addition of the express provision in Subsection (c) that the assessment of the tax upon which the lien of the United States is based shall be conclusively presumed to be valid for purposes of the adjudication in an action to enforce the lien of the United States or to subject property of the delinquent taxpayer to the payment of the tax."

Section 7403 mentioned above is Section 7403, I.R.C. 1954, 26 U.S.C., and is substantially the same as Section 3678, I.R.C. 1939, 26 U.S.C.

> "Senate Committee Report, reported at page 5260:
>
> Section 7403. Action to Enforce Lien or Subject Property to Payment of Tax. This section corresponds to that of the House except for one amendment, and, as amended, contains no material change from existing law. Your committee's amendment strikes from subsection (c) of the House bill a specific provision that the assessment of a tax upon which the lien of the United States is based shall be conclusively presumed to be valid for the purposes of the adjudication in an action to enforce the lien of the United States or to subject property of the delinquent taxpayer to the payment of the tax. The elimination of this provision is not designed to change the effect under existing law given to the assessment in such adjudication".

House Conference Report, House Report No. 2543, at page 5344:

> "Amendment No. 515: The House bill contained a specific provision that the assessment of a tax upon which the lien of the United States is based shall be conclusively presumed to be valid for purposes of adjudication in an action to enforce the lien of the United States or to subject property of the delinquent to the payment of the tax. The Senate amendment eliminated the provision, thereby restoring existing law. The elimination of this provision is not designed to change the effect under existing law given to the assessment in such an adjudication. The House recedes."

The Government's lien for taxes does not stand on any conception of sovereignty but upon specific authority of Section 3670, I.R.C. 1939, 26 U.S.C.

U. S. v. The Pomare, 92 Fed. Supp. 185.

It is abundantly clear that it was the intent of the Congress to leave the validity of the assessment subject to attack in a proceeding to foreclose tax liens in a situation where the United States has, at its own initiative, instituted the action.

Therefore the failure of the District Court to admit evidence purporting to contest the validity of the assessment upon which the tax lien is based is error and the decision should be reversed.

II. THE TAX COLLECTION WAIVERS WERE OBTAINED UNDER DURESS AND WERE THEREFORE INVALID AND THE DISTRICT COURT ERRED IN FAILING TO MAKE FINDINGS ON MATERIAL ISSUES OF FACT AND CONCLUSIONS OF LAW ON THIS ISSUE.

Rule 52(a) of the Federal Rules of Civil Procedure requires that:

> "In all the actions tried upon the facts without a jury, the Court shall find the facts specially and state separately as conclusions of law thereon . . ."

Findings of fact on every material issue are mandatory and there must be such subsidiary findings of fact as will support the ultimate conclusion reached by the Court.

Kweskin v. Finkelstein, 223 Fed. 2d 677, 678.

The trial Court findings shall be so explicit as to give the reviewing Court a clear understanding of the basis of the trial Court's decision and to enable the reviewing Court to determine the grounds upon which the trial Court reached its conclusions.

Maher v. Hendrickson, 188 Fed. 2d 700;
Irish v. U. S., 225 Fed. 2d 3, 8.

The failure to find an ultimate fact is deemed a finding against the party having the burden of proof, and, on appeal, all facts not embraced in special findings will be regarded as not proved by the party having the burden of proof.

Shapiro v. Rubens, 166 Fed. 2d 659, 667.

The Court failed to make findings on the issue of duress and the execution of the waivers. On the evidence before it, the Court should have found that

the purported waivers were obtained under duress and were not voluntary relinquishments of known rights.

Appellant Warren C. Graham testified (114) that he was imprisoned at McNeil Island and that it was his belief that the signing of these waivers would expedite the reports necessary for his parole (226). Appellant Agnes B. Graham testified (194) that she was told that the execution of these waivers were to facilitate obtaining the necessary papers for her husband's release (201).

There could be no waiver where it is obtained by duress or fraud. The party relying on the waivers assumes a burden of proof as to the belief of the party signing the waiver.

> *Panther Rubber Manufacturing Co. v. C. I. R.* (C.C.A. 1, 1930) 45 Fed. 2d 314;
>
> *U. S. v. Southern Lumber Co.* (C.C.A. 8, 1931) 51 Fed. 2d 956, affirmed 52 Sup. Ct. 197, 76 L. Ed. 574, 284 U.S. 680.

The testimony of the agents of the United States, of course, was in a small way inconsistent with the testimony of appellants. However, the issue of the validity in existence or the waivers and their effect was raised in the answer to the complaint (28) as a second and separate defense and appellants maintain that the Court erred in failing to find upon the issue.

If these waivers were signed under duress this action would be barred by the provisions of Sections 275, 276(c) and 3671, I.R.C. 1939, 26 U.S.C. (Statutes of Limitations). This failure to find upon the valid-

ity of these waivers is therefore a failure of findings upon material issue.

III. THE COURT ERRED IN CONCLUDING THAT THE CONVEYANCE BY WARREN C. GRAHAM AND AGNES B. GRAHAM TO FRANK HANSEN WAS A SHAM FOR THE PURPOSE OF DEFEATING FEDERAL TAX LIENS, AND THAT THE SUBSEQUENT TRANSFER TO CATHERINE YOUNG COBB WAS FOR THE SAME PURPOSE, OR A GIFT?

The question of whether the transfer of the property was fraudulent or whether it was a valid gift is of great importance and the question should have been independently found, not, as it was, in the alternative.

The tax lien based upon the withholding taxes of the Graham Ship Repair Company for the years 1945 and 1946, assessed against Warren and Agnes Graham, did not arise until December 6, 1946, the date the jeopardy assessment list for those taxes was received by the Collector of Internal Revenue.

Warren Graham testified, and his testimony was corroborated by other evidence, that his wife had disapproved of a house he had purchased, without her knowledge, in 1945 but that his daughter, Catherine Young Cobb did like the house. For those reasons he decided to make a gift of the house to his daughter.

Mrs. Graham approved and on May 16, 1946, by telephone, the Grahams notified Catherine of their intention. Mrs. Cobb told them that she could not take immediate possession and control as she desired to stay in Georgia until her husband finished his studies

there. The Grahams thereupon conceived of the idea of creating a trust for her by transferring the legal title to Frank Hansen until such time as he, as trustee, should decide it was convenient for Catherine Cobb to take possession and control.

The trust agreement was executed by the Grahams and Frank Hansen on August 1, 1946. The deed transferring the property to Frank Hansen was drawn on August 7, 1946, and recorded on December 7, 1946. Frank Hansen thereafter, on May 28, 1948, transferred legal title to Catherine whose husband, by this time, had finished his studies and no longer had to stay in Georgia.

In this action the United States sought to foreclose a lien allegedly arising in 1945, the aforementioned 1942 transferee tax lien. Admittedly, such a lien, if it legally existed, would be a charge against the transferred lands in the hands of a donee. However, as pointed out in detail, supra, the purported transferee tax assessment and consequent lien were unfounded, totally invalid and of no effect.

The second lien the United States sought to foreclose was the lien based upon the tax assessment predicated upon the withholding tax liability of the Graham Ship Repair Company and that lien did not come into existence until December 6, 1946, several months after the creation of the trust for Catherine Cobb. There was therefore no tax lien or known liability outstanding against Warren or Agnes Graham at the time of their gift to Catherine Cobb and, inasmuch as Warren Graham had a net worth value exceeding $300,000.00 at the time the trust was created,

the gift of a $30,000.00 house would not render him insolvent.

Yet this is precisely what the United States alleged although appellee produced no testimony or evidence substantiating its charge of sham and fraud; in fact, the record reveals that appellee attempted to prove *either* a sham or a gift and put far more emphasis on the gift aspect, concealing the importance and necessity of making a distinction. As a result, the findings of the lower Court read, in part,

> "The conveyance of the above-described property from Frank Hansen to Catherine Young Cobb was a sham and made for the same purpose as was the conveyance from the Grahams to Hansen, namely, to conceal the Graham's interest therein. In any event the transfer to Catherine Young Cobb was no more than a gift."

The purpose of Rule 52(a), Rules of Civil Procedure, 28 U.S.C., providing that the trial Court in a non-jury case, shall find the facts especially, is intended to aid appellate Courts by giving a clear understanding of the bases of the court's decision.

Skelly Oil Co. v. Holloway, 171 Fed. 2d 670.

Furthermore, the appellee alleged a fraudulent transfer and it is a basic rule that to establish fraud the evidence must be clear and convincing and the burden of proof is on the party asserting the fraud.

United States v. De Martini, 53 Fed. Supp. 162;

Hedden v. Waldeck, 9 Cal. 2d 631, 72 Pac. 2d 114;

Ragsdale v. Paschal, 118 F. Supp. 280.

Appellants submit that the finding of the District Court that the transfer of the land was a sham and fraud was based on the erroneous assumption that the transferee tax lien for 1942 taxes against the Kincaid Company was valid; that, in law and fact, the said lien did not exist and there is no evidence to support the finding of a fraudulent transfer and the finding was error.

CONCLUSION.

In summary, it is the contention of the appellants that the Court below erred in (a) failing to allow the appellants to introduce evidence that no tax liability existed because of failure to give him the necessary 90 day deficiency notice, (b) failure to find that the statute of limitations applied because tax waivers were signed under duress while appellant was a prisoner at McNeil Island, Washington, and (c) failure to make a proper finding on the gift of appellant's home to his daughter Catherine Young Cobb. For the foregoing reasons it is respectfully submitted that the judgment herein should be reversed.

Dated, San Francisco, California,
November 14, 1956.

Schofield, Hanson & Jenkins,
Thomas M. Jenkins,
Attorneys for Appellants.